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Mondelēz International, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AVI KLAMMER, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

MONDELÉZ INTERNATIONAL, INC.,

Defendant.

Case No. 4:22-cv-2046-JSW

The Honorable Jeffrey S. White

**[PROPOSED] ORDER GRANTING MOTION
TO DISMISS**

Hearing Date: August 19, 2022

Hearing Time: 9:00 a.m.

Courtroom: Remote (Zoom)

1 Defendant Mondelēz Global LLC (“MDLZ,” incorrectly sued as Mondelēz International, Inc.) has
2 moved to dismiss Plaintiff Avi Klammer’s Class Action Complaint. Having considered the briefs and
3 arguments and counsel, the Court hereby GRANTS MDLZ’s motion to dismiss. Because the parties are
4 familiar with the allegations of Plaintiff’s complaint, the Court does not summarize them here.

5 Plaintiff’s primary theory of deception is that the front packaging of Enjoy Life Lentil Chips
6 misleads consumers into believing that they are “high” in protein—or, in other words, that they contain at
7 least 20% of the Daily Reference Value (“DRV”) of protein, or at least 10 grams of protein, per serving.
8 But as the Ninth Circuit has made clear, this Court must evaluate whether MDLZ’s labeling is misleading
9 by considering the labeling “as a whole,” instead of evaluating a single phrase (such as “high protein”) in
10 isolation. *Freeman v. Time, Inc.*, 68 F.3d 285, 290 (9th Cir. 1995); *see also Weiss v. Trader Joe’s Co.*, 838
11 F. App’x 302, 303 (9th Cir. 2021) (noting that “product packaging should be examined in its full context
12 because it would be unreasonable to cherry-pick discrete statements to prove deception”). Here, the
13 labeling of Enjoy Life Lentil Chips does not describe the chips as a “high protein” food.” Instead, it
14 includes the phrase “high protein lentils, finely milled into flour for a light and airy chip with serious
15 crunch.” Compl. ¶ 18. Viewed as part of that phrase, no reasonable consumer would construe the phrase
16 “high protein lentils” as a representation about the protein content of the chips—let alone as a claim that
17 the chips satisfy the FDA’s requirements for making a “high” nutrient content claim. *See generally* 21
18 C.F.R. § 101.54. Instead, a reasonable consumer would understand that the phrase “high protein lentils”
19 refers to the lentil flour, which is higher in protein than other flours.

20 It is irrelevant that the FDA has promulgated requirements governing the use of the term “high” on
21 food labeling. Absent any allegation that “reasonable consumers are aware of [the FDA’s] complex
22 regulations” or that “they incorporate the regulations into their day-to-day marketplace expectations,” the
23 FDA’s regulation governing “high” claims, 21 C.F.R. § 101.54(b) has no bearing on whether MDLZ’s
24 labeling is likely to mislead a reasonable consumer. *Wynn v. Topco Assocs., LLC*, No. 19-11104, 2021
25 WL 168541, at *3 (S.D.N.Y. Jan. 19, 2021). Absent any plausible allegation that reasonable consumers
26 share the FDA’s definition of “high protein” or that they construe the phrase “high protein lentils” to mean
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1 that Enjoy Life Lentil Chips contain 20% of the DRV of protein per serving, Plaintiff has not stated a
2 plausible claim.

3 Plaintiff also alleges that certain aspects of the back labeling—including the phrase “Protein-
4 Packed” and the omission of the percent of daily value of protein from the Nutrition Facts panel—are
5 misleading and unlawful. But these claims fail because Plaintiff has not plausibly alleged that he reviewed
6 the back label or that these aspects of the labeling played any role in his decision to purchase Enjoy Life
7 Lentil Chips. Instead, Plaintiff alleges that he purchased the product in reliance on “the high protein
8 representations *printed on the front of the Product.*” Compl. ¶ 17 (emphasis added). Because the back-
9 label claims Plaintiff challenges “cannot be said to have influenced his purchase,” Plaintiff “cannot state a
10 claim that derives from this theory of misrepresentation.” *Brazil v. Dole Packaged Foods, LLC*, 660 F.
11 App’x 531, 534 (9th Cir. 2016) (citation omitted); *see also Pardini v. Unilever U.S., Inc.*, 961 F. Supp. 2d
12 1048, 1060 (N.D. Cal. 2013) (“Plaintiff has not pled that she ever looked at the nutrition panel. As such,
13 it is implausible that she was misled by its lack of disclosures.”).

14 Plaintiff’s challenges to the back-label claim that Enjoy Life Lentil Chips are “Protein-Packed”
15 independently fail because this statement is non-actionable puffery. In contrast to a “specific and
16 measurable claim” about the amount of protein in the product, the phrase “Protein-Packed” is marketing
17 puffery that is not “capable of being proved false or of being reasonably interpreted as a statement of
18 objective fact.” *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1998);
19 *see also, e.g., Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 855 (N.D. Cal. 2012) (holding that
20 “packed with power” was non-actionable puffery because it “say[s] nothing about the specific
21 characteristics or components of the computer”).

22 Because Plaintiff has not plausibly alleged that the front labeling of Enjoy Life Lentil Chips violates
23 the FDA regulations, and because he has not plausibly alleged that the “Protein-Packed Claim” or omission
24 of the percent of daily value of protein from the Nutrition Facts panel affected his purchasing decision, he
25 has not stated a claim under the “unlawful” prong of California’s Unfair Competition Law (“UCL”). *See*
26 *generally Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1143–44 (2020) (holding that the
27 plaintiff’s claim based on the “alleged unlawfulness of the label” failed when the plaintiff did not allege
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1 that the purported regulatory violation “had anything to do” with her decision to purchase the product).
 2 And absent a plausible allegation that MDLZ’s labeling is likely to mislead reasonable consumers, Plaintiff
 3 has not stated a plausible claim under the UCL’s “unfair” prong, a plausible claim for breach of express
 4 warranty, or a plausible claim for unjust enrichment. *See, e.g., Ahern v. Apple Inc.*, 411 F. Supp. 3d 541,
 5 561 (N.D. Cal. 2019) (“[W]here the plaintiffs’ unfair prong claims overlap entirely with their claims of
 6 fraud, the plaintiffs’ unfair prong claim cannot survive”) (citations and internal quotation marks
 7 omitted); *Weiss*, 838 F. App’x at 303 (affirming dismissal of breach of warranty claims premised “on the
 8 exact same representations as her consumer protection claims”); *Girard v. Toyota Motor Sales, U.S.A.,*
 9 *Inc.*, 316 F. App’x 561, 563 (9th Cir. 2008) (noting that an “unjust enrichment claim also fails” when a
 10 defendant’s “non-deceptive advertising does not entitle [the plaintiff] to restitutionary relief”).

11 Because the Court concludes that Plaintiff has not stated a plausible claim against MDLZ, it does
 12 not reach MDLZ’s argument that California’s consumer protection statutes do not apply to the putative
 13 nationwide class or its argument that Plaintiff cannot seek equitable relief because he has an adequate
 14 remedy at law.

15 The Court accordingly GRANTS MDLZ’s motion to dismiss with prejudice and without leave to
 16 amend. The Clerk of the Court is instructed to enter a judgment of dismissal and to close the file.

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 18 IT IS SO ORDERED:

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 20 Dated: _____, 2022

21 By: _____
 22 The Honorable Jeffrey S. White
 23 Senior United States District Judge
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